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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY PAUL ROBINSON,

Defendant and Appellant.

A154644

(City and County of San Francisco
Super. Ct. No. 17010649)

Pursuant to a plea agreement, defendant Jeffrey Paul Robinson pleaded guilty to assault as a felony offense in exchange for an indicated sentence of probation and one year in county jail. In lieu of serving the one year, defendant could complete a six-month residential drug treatment program. At the change of plea proceeding, defendant agreed to be sentenced by a different judge and to waive any custody credits he had accrued at the time of sentencing to allow the court to impose the promised sentence. Thereafter, at the initial sentencing before a different judge, the court accepted the plea agreement and imposed a three-year probationary term and a one-year jail term that was stayed to allow defendant to complete the six-month residential drug treatment program. The sentencing court also secured defendant's express agreement to waive 321 custody credits that he had accrued in order to allow the court to impose the promised sentence. When defendant failed to enter drug treatment, the court imposed the one-year jail term and denied defendant's request to use the 321 custody credits to reduce that term in light of his waiver of those credits.

Defendant now appeals, arguing that the sentencing court’s refusal to reduce the one-year jail term by the 321 custody credits was a violation of the parties’ plea agreement as explained by the court at the change of plea proceeding. According to defendant, at that earlier proceeding the court had explained that defendant was only agreeing to *temporarily* waive the 321 custody credits to allow him to complete drug treatment, and he had reserved his right to use those waived credits to reduce the one-year jail term in the event he failed at drug treatment. We disagree, and conclude the sentencing court properly found that at the initial sentencing defendant had expressly agreed to waive the 321 custody credits to reduce the one-year jail term, thereby modifying the parties’ plea agreement as explained at the change of plea proceeding. Accordingly, we affirm.

FACTS¹

On January 11, 2018,² at a change of plea proceeding, defendant pleaded guilty to assault upon a person by means of force likely to produce great bodily injury as a felony offense (punishable by a term of two, three, or four years in state prison). (Pen. Code, § 245, subd. (a)(4).³) Before accepting the plea, the court (Hon. Christopher Hite), in pertinent part, discussed with defendant and counsel certain “unusual” aspects of the “disposition:”

“THE COURT: This . . . will be a probationary matter. [¶] The only unusual aspect to it is that he will be sentenced to a year . . . in the county jail. [¶] That may be served through a residential treatment program with him doing an actual six months in the program.

“[DEFENSE COUNSEL]: Correct.

[¶] . . . [¶]

“[PROSECUTOR]: If I may add one . . . oddity for the purposes of this sentencing. [¶] Mr. Robinson is going to be waiving the credit he already has so he can do the six months in the program.

“THE COURT: That’s correct. [¶] He is waiving it for purposes of today’s disposition only. If he fails the program, first of all, if he fails the program, he will not

¹ We set forth only those facts that are necessary to resolve this appeal.

² All further unspecified dates occurred in 2018.

³ All further unspecified statutory references are to the Penal Code.

get any credit for time having spent in the program. [¶] He will have to do the one year – well, let’s go off the record for one second. (Discussion off the record.)

“THE COURT: Back on the record. [¶] So if he fails [sic] out of the program, sir, even if you walk away from the program and you’ve done four months, you are going to have to do one year in the county jail at half-time credits, and you will get back the credits that you waive on the date of sentencing.

“THE DEFENDANT: Yes, your Honor.

“THE COURT: Towards that. [¶] But if you walk away from the program, you have to start all over again with one-year county jail, half time credits. [¶] So you will have to do an actual six months minus how much time you have at the time of sentencing.

“THE DEFENDANT: Yes, your Honor.

“[DEFENSE COUNSEL]: You will not get credit in jail for days in the program.

“THE DEFENDANT: Yes, your Honor.

“THE COURT: Okay?

“THE DEFENDANT: Yes, your Honor.”

The court further informed defendant that the court’s acceptance of his plea at that time was not binding on the court, and that if the court withdrew its acceptance of the plea, defendant would be allowed to withdraw his plea and enter a plea of not guilty, with the proviso that any dismissed charges or allegations might be reinstated against him. The court also secured defendant’s agreement to be sentenced by a different judge “so long as the sentence is the same” as had been discussed “here today.”

On February 2, the matter appeared on calendar for the scheduled sentencing before the Honorable Braden C. Woods (sentencing court). Defendant appeared and was represented by counsel. The sentencing court informed the parties that it had taken judicial notice of the court file, “in particular the minutes from when Mr. Robinson entered his plea.” The sentencing court also noted the matter had been discussed in chambers, and it agreed with the plea . . . and counsel was free to interject if it did not get “the terms and conditions as we discussed correct.”

Because defendant was waiting for a bed in the residential drug treatment program, defense counsel asked to set a date for either verification that defendant had entered the program or defendant would appear in court with “some explanation. Otherwise, a bench warrant will issue and he will be subject to the one-year county jail sentence that is being stayed.” The sentencing court advised defendant, in pertinent part:

“THE COURT: So, Mr. Robinson, I know [defense counsel] has discussed that with you a lot, because you’ve got a lot on the line. So, is what you want me to do, do the sentencing today, give you the credit for time served and you will be released later today, and you’ll get to the program on your own with [defense counsel’s] help and the help of her team?

“THE DEFENDANT: Yes, Your Honor.

“THE COURT: Do you understand, sir, if I get a report on Friday the 9th that you’re not in the program and the bed was available, then you’re going to be subject to 364 days in custody with no credits. Do you understand that?

“The DEFENDANT: Yes, Your Honor.

[¶] . . . [¶]

“THE COURT: Anything else, counsel, at this point?

“[THE PROSECUTOR]: No, Your Honor.

“[DEFENSE COUNSEL]: No.”

During the imposition of sentence, the following colloquies occurred between the sentencing court, counsel and defendant:

“THE COURT: Mr. Robinson, pursuant to your negotiated plea and agreement approved by The Court, it is the judgment of The Court on your plea of guilty to a violation of Penal Code Section 245, subdivision (a), paragraph (4), a felony, that you be sentenced as follows: Imposition of sentence is suspended. You will be placed on three years of formal probation to the Adult Probation Department under the following terms and conditions. [¶] You’re to serve one year in the county jail that will be stayed pending successful completion of the residential and outpatient program through HealthRight 360. [¶] You’ll receive 161 days credit plus 160 additional days pursuant to Penal Code Section 4019 for [a] total of 321 days.

“[PROSECUTOR]: . . . [Defendant] did agree to waive all of these credits. He will not be waiving them permanently. If there’s a probation revocation he’ll still have those credits, but as far as this sentence goes he has agreed as part of this disposition to waive all of these credits in order to conduct this plea.

“THE COURT: Do you understand that, Mr. Robinson?

“[DEFENDANT]: Yes, Your Honor.

[¶] . . . [¶]

“THE COURT: . . . [¶] The record should reflect he also must satisfactorily complete the six-month HealthRight 360 Program. . . .

“[DEFENSE COUNSEL]: Your Honor, I’m sorry. I don’t want to interrupt, but your statements made it seem that the HealthRight 360 program was a condition of probation, and it’s not. He would be subject to a year in county jail if he failed to do that, but not the exposure on a 245(a)(4). [¶] Of course, the Probation Department may have an individualized treatment plan that requires something, but at this point the sentence is not contemplating that the program is a condition of probation. It’s an alternative to a jail sentence.

“THE COURT: Are you okay with that, [prosecutor]?

“[THE PROSECUTOR]: Yes.

“THE COURT: With that caveat, The Court is fine with that. [¶] Mr. Robinson, your current term of probation begins today. . . .”

The sentencing court confirmed defendant’s agreement to the sentence in the following manner:

“THE COURT: . . . Mr. Robinson, I know we’ve all gone back and forth, but based on these terms by your attorney, [the prosecutor] and [the court], are you willing to accept your sentence and the terms and conditions of your probation as we’ve all explained them to you here in court today?

“THE DEFENDANT: Yes, Your Honor.”

The matter was continued to February 9 for a status report on defendant’s entry into the residential drug treatment program.

On February 9, the matter appeared before the sentencing court; defense counsel was present, but defendant did not appear. The case was continued to March 1, and defendant was ordered to appear on the continued date. Thereafter, on March 1, when defense counsel appeared but defendant again failed to appear, the sentencing court administratively revoked defendant’s probation and issued a bench warrant for his arrest. Defendant was taken into custody on April 29.

On May 24, defendant appeared with counsel before the sentencing court for its consideration of the imposition of the one-year jail term following defendant’s failure to enter the residential drug treatment program. The sentencing court indicated it had read the court file, including the official transcript of the change of plea proceeding, and the unofficial transcript of the sentencing proceeding prepared by the court reporter from notes. Following argument by counsel, the sentencing court imposed the one-year jail term and awarded defendant credit for time served for 26 days in custody from April 29 through May 24. The sentencing court, however, denied defendant’s request to further reduce the one-year jail term by applying the 321 custody credits that had accrued at the time of the initial sentencing. In so ruling, the sentencing court relied on its statements and those of counsel and defendant at the initial sentencing, especially noting the failure

of defendant and his counsel to object at that hearing to the descriptions of the scope of defendant's waiver of credits. Defendant filed a timely appeal.

DISCUSSION

Defendant's sole issue raised on appeal is that the sentencing court should have awarded him 321 custody credits to reduce the imposed one-year jail term. We conclude defendant's claim is unavailing.⁴

A. Applicable Law

We begin with a description of the applicable principles of law governing our resolution of this appeal. Because the charges against defendant were resolved by a plea agreement, we start with a "description of the basic nature of plea agreements. A plea bargain is a negotiated agreement between the prosecution and the defendant by which a defendant pleads guilty to one or more charges in return for dismissal of one or more other charges. [Citation.] The agreement must then be submitted to the trial court for approval. The court must tell the defendant that the court's acceptance of the proposed plea is not binding, that the court 'may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval,' and that if the court does withdraw its approval the defendant may withdraw the plea. (§ 1192.5.) Thus, '[j]udicial approval is an essential condition precedent to the effectiveness of the 'bargain' worked out by the defense and prosecution.'" [Citation.] [¶] Because a negotiated plea agreement is in the nature of a contract, 'it is interpreted according to

⁴ Defendant has served his one-year jail term and was released from custody in October 2018. Thus, defendant's requested relief on appeal, that we remand with directions to the sentencing court to apply the 321 custody credits to reduce the one-year jail term, has been rendered moot. Nonetheless, we address defendant's substantive claim as the parties agree that if defendant's appellate claim has merit, this court may still grant him a remedy by remanding with directions to the sentencing court to apply the 321 custody credits to reduce any outstanding fines (§ 2900.5; see *People v. Pinon* (2016) 6 Cal.App.5th 956, 957; see also *People v. Sellner* (2015) 240 Cal.App.4th 699, 701 [court denied motion to dismiss appeal as moot because sentence had been served where sentence affected custody credits that could be applied to outstanding fines and fees under section 2900.5].)

general contract principles.’ [Citation.] The trial court’s approval of the agreement binds the court to the terms of the plea bargain, and the defendant’s sentence must be within the negotiated terms. [Citations.]” (*People v. Martin* (2010) 51 Cal.4th 75, 79.) Thereafter, the “material terms” of a negotiated plea agreement cannot be modified without the parties’ consent. (*Id.* at p. 80.)

We are also here concerned with the law governing the scope of defendant’s waiver of credits – “commonly referred to as a ‘*Johnson* waiver’ (*People v. Johnson* (1978) 82 Cal.App.3d 183 [(*Johnson*)).” (*People v. Jeffrey* (2004) 33 Cal.4th 312, 315.) “A *Johnson* waiver is a waiver of a statutory right to credit for time served against a subsequent county jail or state prison sentence pursuant to section 2900.5.” (*People v. Arnold* (2004) 33 Cal.4th 294, 307 (*Arnold*).) In *People v. Johnson* (2002) 28 Cal.4th 1050, 1054 (*Johnson II*), the Supreme Court approved a waiver of credits that was obtained, like in defendant’s case, when a defendant is originally placed on probation, “holding that a defendant’s ability to ‘expressly waive entitlement to section 2900.5 credits against an ultimate jail or prison sentence for past and future days in custody’ means that ‘a trial court has discretion to condition a grant . . . of probation upon a defendant’s express waiver of past and future custody credits.’ ” (*People v. Arevalo* (2018) 20 Cal.App.5th 821, 830.) Because “section 2900.5 treats all credits uniformly, wherever accrued and wherever applied,” unless otherwise limited, “a waiver of custody credits is presumptively applicable to any future term of imprisonment.” (*People v. Burks* (1998) 66 Cal.App.4th 232, 237 (*Burks*).) In *Burks*, this court held that the law should not “permit a defendant to impose unspoken restrictions on a waiver of custody credits.” (*Id.* at p. 236, fn 3.) “If a defendant wants to restrict the waiver of custody credits” for a limited purpose and “preserve the same credits for future use,” the burden is on “defendant to propose that to the sentencing court for its approval.” (*Id.* at p. 236.)

B. Analysis

Defendant initially argues that in determining the scope of his waiver of credits at the May 24 hearing, the sentencing court failed to consider the statements made by the court that adjudicated at the change of plea proceeding (plea court), that the waiver of the

321 custody credits would not apply to any future imposition of the one-year term in the event defendant failed at drug treatment. He specifically relies on the plea court's statements that if defendant failed to complete drug treatment and he became subject to the one-year term, he would "get back the credits that you waive on the date of sentencing . . . [t]owards that;" and would "have to do an actual six months *minus* how much time you have at the time of sentencing." (Italics added.)

However, at the time of the initial sentencing both the sentencing court and the prosecutor described defendant's waiver of credits in unequivocal terms as applying to the future imposition of the one-year term. The sentencing court explicitly informed defendant that if he failed to enter drug treatment on February 9, he would be required to serve "364 days in custody with no credits." The only credits that the court could have been referring to at that time were the 321 custody credits that defendant had already accrued. When considered in its context, the court's statement cannot be read, as defendant suggests, to limit a waiver of credits accrued for only future time spent in drug treatment. We therefore agree with the Attorney General that at the initial sentencing, the parties' plea agreement was modified to clarify that defendant's waiver of credits applied to any future imposition of the one-year term. Consequently, the sentencing court validly gave effect to defendant's waiver by refusing to apply the 321 custody credits to reduce the imposed one-year term.

We further find no merit to defendant's argument that the sentencing court erred in relying on the failure of defendant and defense counsel to object to the scope of the waiver of credits at the initial sentencing. "Whether or not a defendant waives an objection to punishment exceeding the terms of the bargain by the failure to raise the point in some fashion at sentencing depends upon whether the trial court followed the requirements of section 1192.5." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024, 1026 (*Walker*), overruled on another ground in *People v. Villalobos* (2012) 54 Cal.4th 177, 183.) When the section 1192.5 "admonition is given, and the defendant does not ask to withdraw the plea or otherwise object to the sentence, he has waived the right to complain of the sentence later." (*Walker, supra*, at p. 1026.) In this case, at the change

of plea proceeding, defendant was concededly advised of his section 1192.5 rights. He was further advised that his agreement to allow a different judge to impose sentence was limited to allowing that judge to impose the sentence agreed to at the change of plea proceeding. Thereafter, at the initial sentencing, defendant and his counsel were given the opportunity, and indeed, encouraged to interject if the sentencing court did not “get the terms and conditions . . . correct.” Neither defendant nor defense counsel objected or otherwise called to the sentencing court’s attention any error in the scope of the waiver of credits. Accordingly, at the May 24 hearing, the sentencing court properly found, in effect, that defendant had waived any argument that his waiver of credits violated the terms of the plea agreement as described at the change of plea proceeding.

Lastly, we are not persuaded by defendant’s argument that any ambiguity between the statements made at the change of plea proceeding and those made at the initial sentencing should have been resolved in his favor. Before defendant changed his plea he was facing a state prison term, which would have been reduced by any custody credits he had accrued by the time of the initial sentencing. At the initial sentencing, he chose to waive his 321 custody credits in return for the benefits of being placed on probation and the imposition of a term of one-year in county jail, which was stayed to allow him to participate in drug treatment. By the explanations provided by the sentencing court and the prosecutor at the initial sentencing, defendant was informed his waiver of credits “was to give [him] an incentive to successfully complete the residential treatment program based on the knowledge that failure to do so would expose him to imposition of” one year in county jail, unreduced by the 321 custody credits. (*Johnson II, supra*, 28 Cal.4th at p. 1056.) Without a waiver of those custody credits, defendant would not have been incentivized to complete or even enter drug treatment since a failure to do so would have simply resulted in defendant having virtually no jail term as the one-year term would have been reduced by the 321 custody credits. (*Arnold, supra*, 33 Cal.4th at p. 308.) Thus, defendant could not reasonably have thought he would be able to use the 321 custody credits to reduce the one-year term in the event he failed at drug treatment because he would be left no worse off if he failed at drug treatment than he was at the

time of the initial sentencing. Indeed, had the court allowed defendant to “recapture” (*Burks, supra*, 66 Cal.App.4th at p. 234) the 321 custody credits to reduce the one-year term, he would have actually been unjustly enriched because he would have gotten the benefit of the bargain, as described at the initial sentencing, and then been “permitted to revoke the consideration he gave up to obtain the benefit of that bargain” (*Arnold, supra*, at p. 308). “As a matter of sound sentencing policy, the law should not afford probationers incentives or rewards for refusing to comply with the terms and conditions of probation.” (*Ibid.*, fn. omitted.)

DISPOSITION

The May 24, 2018 order is affirmed.

Petrou, J.

WE CONCUR:

Siggins, P.J.

Fujisaki, J.

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